Supreme Court, U.S.
FILED
AUG 29 2003
OFFICE OF THE CLERK

No. 02-1580

IN THE

Supreme Court of the United States

RICHARD VIETH, *et al.*,

Appellants,

v.

ROBERT C. JUBELIRER AND JOHN M. PERZEL, *et al.*,

Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania

BRIEF OF *AMICI CURIAE* JACK N. RAKOVE, ALEXANDER KEYSSAR, PETER S. ONUF AND ROSEMARIE ZAGARRI IN SUPPORT OF APPELLANTS

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August 29, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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STATEMENT OF INTEREST OF *AMICI CURIAE*[*]

Amici Curiae are historians with a scholarly interest in the era of the American Revolution and the adoption of the Federal Constitution, and the history of political representation. *Amici Curiae* believe that historical understandings of the origins of American ideas of representation may assist the Court in its analysis of the legal issues presented, and submit this brief to aid the Court in that endeavor. *Amici Curiae* also support the general principles of equal representation that appellants seek to vindicate in this suit.

Jack N. Rakove is the W. R. Coe Professor of History and American Studies, and Professor of Political Science at Stanford University, where he has taught since 1980. He also is a visiting professor at New York University School of Law. He was educated at Haverford College, where he earned a B.A. in History in 1968, Edinburgh University, and Harvard University, where he received his Ph.D. in History in 1975. He is the author of four books: THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS (1979); JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC (revised ed. 2001); ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996), which won the 1997 Pulitzer Prize in History, the 1997 Fraunces Tavern Museum Book Award, and the 1998 Society of the Cincinnati Book Prize; and DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS (1997). He is also the editor of INTERPRETING THE

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[*] No person other than *amici curiae*, or their counsel, authored this brief in whole or in part or made a monetary contribution to the preparation or submission of this brief. Perlette Jura, a student at the Stanford Law School, provided valuable research assistance. The parties have given written consent to the filing of this brief, and the letters of consent have been filed with the Court.

CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (1990); JAMES MADISON: WRITINGS (1999); a collection of scholarly essays on THE UNFINISHED ELECTION OF 2000 (2001); and THE FEDERALIST: THE ESSENTIAL ESSAYS (2003). He has contributed chapters to numerous scholarly collections, and written essays for various law reviews, including the STANFORD LAW REVIEW, UNIVERSITY OF CHICAGO LAW REVIEW, YALE LAW JOURNAL, and YALE JOURNAL OF LAW AND HUMANITIES. He has also published numerous op-ed articles in such newspapers as the LOS ANGELES TIMES, CHICAGO TRIBUNE, WASHINGTON POST, and NEW YORK TIMES.

Alexander Keyssar is the Matthew W. Stirling, Jr. Professor of History and Social Policy at Harvard University, where he also earned both his B.A. and Ph. D. Before returning to Harvard, he taught at the Massachusetts Institute of Technology and Duke University. An historian by training, he has specialized in the excavation of issues that have contemporary policy implications. His 1986 book, OUT OF WORK: THE FIRST CENTURY OF UNEMPLOYMENT IN MASSACHUSETTS, was awarded three scholarly prizes. His most recent book, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000), received the Beveridge Prize of the American Historical Association for the best book in U.S. history and the Eugene Genovese Prize given by the Historical Society. It was also a finalist for the Pulitzer Prize in History and the LOS ANGELES TIMES Book Award. Keyssar is co-author of INVENTING AMERICA, a text integrating the history of technology and science into the mainstream of American history.

Peter S. Onuf is the Thomas Jefferson Memorial Foundation Professor in the Corcoran Department of History at the University of Virginia, where he specializes in the history of the early American republic. Educated at Johns Hopkins University, where he received his Ph.D. in 1973, Onuf taught at Columbia University, Worcester Polytechnic

Institute, and Southern Methodist University before coming to Virginia in 1990. His first book, THE ORIGINS OF THE FEDERAL REPUBLIC (1983), was a study of the relation between jurisdictional controversies over land claims and the position of the states in the American federal system. His recent work on Thomas Jefferson's political thought, culminating in JEFFERSON'S EMPIRE: THE LANGUAGE OF AMERICAN NATIONHOOD (2000), grows out of his earlier studies on the history of American federalism, foreign policy, and political economy. With his brother, political theorist Nicholas G. Onuf, he is now working on the second volume of their collaboration, FEDERAL UNION, MODERN WORLD, a history of international law and order in the Atlantic states' system during the Age of Revolutions and early nineteenth century. Onuf is also one of the authors, with Edward L. Ayers, of ALL OVER THE MAP: RETHINKING REGION AND NATION IN THE UNITED STATES (1996), the editor of JEFFERSONIAN LEGACIES (1993), and co-editor of SALLY HEMINGS AND THOMAS JEFFERSON: HISTORY, MEMORY, AND CIVIC CULTURE (1999) and THE REVOLUTION OF 1800: DEMOCRACY, RACE, AND THE NEW REPUBLIC (2002), all published by University Press of Virginia.

Rosemarie Zagarri is Professor of History at George Mason University. She earned her B.A. from Northwestern University and completed her Ph.D. at Yale University in 1984 and is a specialist in early American history with a particular interest in apportionment and districting. Her published works include THE POLITICS OF SIZE: POLITICAL REPRESENTATION IN THE UNITED STATES, 1776-1850 (1987); A WOMAN'S DILEMMA: MERCY OTIS WARREN AND THE AMERICAN REVOLUTION (1995); and DAVID HUMPHREY'S "LIFE OF GENERAL WASHINGTON" WITH GEORGE WASHINGTON'S "REMARKS" (1991) (edited, with an introduction), as well as numerous articles in scholarly journals and books.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The issue before this Court is whether the Republican-dominated Pennsylvania legislature's drawing of congressional districts for the conceded purpose of favoring Republican candidates in federal elections violates the federal Constitution. This brief is submitted to help the Court understand the formative developments in eighteenth-century American political thought that underlie Article I, Section 4, Clause 1 of the Constitution, which vested the power to regulate congressional elections in state legislatures, subject to congressional alteration, as well as certain essential principles of Article I itself.

As this Court has explained, the founding generation "split the atom of sovereignty," vesting particular aspects of sovereignty in both the States and the new federal government.[1] As the Preamble of the Constitution makes clear, however, sovereignty ultimately resides in the people themselves. In creating the new federal government in 1787, the Framers recognized that a measure of "residuary sovereignty" remained in the States.[2] The Senate was constructed with that "residuary sovereignty" in mind, representing the states as equally autonomous jurisdictions, regardless of differences in population, wealth, or size, and presumably protecting the just powers of the state legislatures, which originally appointed senators. U.S. CONST. art. I, § 3, cl. 1. The members of the House of

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[1] *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). The effective division of sovereignty under the Articles of Confederation, as framed in 1776-77 and ratified in 1781, is explored in JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS, chs. 7-8 (1979).

[2] THE FEDERALIST NO. 43, at 285 (James Madison) (Issac Kramnick ed., 1987); THE FEDERALIST NO. 62, at 365 (Alexander Hamilton or James Madison).

Representatives, however, were to be chosen directly by the people. This body represented an American innovation in government. Under the Articles of Confederation, the state legislatures appointed delegates to the Continental Congress; now one house of the new Congress was to represent the people directly. The Framers intended that, in stark contrast to the British Parliament, the House would be a "mirror" of the people themselves, one unclouded by "rotten boroughs," "pocket boroughs," and the other forms of "corruption" that allowed the Crown to control the composition of Parliament and virtually all of its decisions.

Although "mirroring" is not a fixed concept and can be accomplished in any number of ways, its central requirement is that any regulation of the people's right to select their congressional representatives must promote a rational conception of "fair representation." In keeping with the emergent American idea of popular government, the Framers viewed the role of a state legislature when regulating congressional elections as that of an agent acting on behalf of its principal, *i.e.*, the people themselves. Particularly in light of the state legislature's power to appoint senators, both Federalists and Anti-Federalists understood that it would be plainly impermissible for the state legislature to influence the outcome of elections to the House of Representatives in order to favor whatever "factions" or interests held sway in the state house. Such "self-dealing" would replicate the very corruption of the British system that the Framers sought to eliminate. These historical considerations appear pertinent to this Court's judgment in this case.

ARGUMENT

I. A CENTRAL PRINCIPLE BEHIND THE FRAMING OF ARTICLE I WAS THAT THE HOUSE OF REPRESENTATIVES SHOULD EFFECTIVELY "MIRROR" THE COMPOSITION OF THE NATION IT REPRESENTED.

By the middle decades of the eighteenth century, both the idea and practice of representation in the American colonies had advanced beyond the prevailing norms of contemporary Britain. The constitutional disputes that disrupted Anglo-American relations after 1765 both reflected and magnified this divergence. In Britain, the orthodox view held that the whole people were somehow represented in the House of Commons, notwithstanding the limited extent of the suffrage and the fact that numerous communities sent no members to Parliament. Under the prevailing theory of "virtual representation," these limitations on the scope of representation did not impair the authority of Parliament because its members possessed adequate knowledge of the condition of the realm and were obliged to consider the general good when legislating.[3] In the colonies, by contrast, representation in the colonial assemblies was generally extended to new communities as they were organized, and easy access to land created a relatively large electorate. Representatives, moreover, were expected to be accountable to their immediate constituents. Americans believed they lived under a system of actual representation in which legislators and citizens were closely bound.[4]

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[3] JOHN PHILLIP REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 50-62 (1989).

[4] REID, CONCEPT OF REPRESENTATION, *supra*, at 128-36; BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 161-75 (1967).

The great constitutional debate that began in 1765 reinforced this conviction, as Americans were driven to explain why they were not subject to the jurisdiction of a Parliament in which they were not, and never could be, properly represented. So effective were American arguments on this head that defenders of Parliament's authority to bind the colonies "in all cases whatsoever" came to rely not on claims of representation but rather on the abstract doctrine of indivisible parliamentary sovereignty.[5] The Americans' belief in the superiority of their system of actual representation in turn shaped the new constitutions that the colonies began drafting in 1776. One critical element of the American concept of representation was that a representative assembly should be a "mirror" or "miniature" of the larger society. One should be able to look at a legislative body and form an accurate impression of its constituents.

Leading statements of these ideas can be found in two influential tracts written in the spring of 1776, as the colonists actively began considering the adoption of new constitutions of government. The clearest and possibly first statement of the relation between representative body and society appeared in John Adams' *Thoughts on Government*.

> The principal difficulty lies, and the greatest care should be employed in constituting this Representative Assembly. It should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them. That it may be the interest of this Assembly to do strict justice at all times, it should be an equal representation, or in other words equal interest among the people should have equal interest in it. Great care

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[5] BAILYN, IDEOLOGICAL ORIGINS, *supra*, at 161-62, 198-202.

> should be taken to effect this, and to prevent unfair, partial, and corrupt elections.[6]

The idea that the distribution of representatives had to be regularly monitored was similarly expressed in *Four Letters on Interesting Subjects*.

> A Constitution should lay down some permanent ratio, by which the representation should afterwards encrease or decrease with the number of inhabitants; for the right of representation, which is a natural one, ought not to depend upon the will and pleasure of future legislatures.[7]

Together, these two statements reflect the leading edge of American opinion. The fundamental units of the polity are individual citizens, whose equality of rights extends to the realm of representation. This recognition explains why the founding generation was so attentive to questions regarding the extent of the suffrage and the importance of securing an "equal" representation in the state legislatures and later the new Federal Constitution. Equality could be and was defined in different ways, ranging from an equality of voters comparable to our modern one-person, one-vote standard, to an equality of the support that different locales gave to government (as measured through taxation), to an equality of the communities themselves, whether towns, counties, or states.[8] But however defined, this led to the notion that there should be a direct and accurate correspondence between the constituent elements of society and the legislature.

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[6] [John Adams], *Thoughts on Government* (Philadelphia, 1776), *reprinted in* 1 FOUNDERS' CONSTITUTION 108 (P. Kurland & R. Lerner eds., 1987).

[7] *Four Letters on Interesting Subjects* (Philadelphia, 1776), *partly reprinted in* 1 FOUNDERS' CONSTITUTION, *supra*, at 639. Some scholars speculate that the author of this pamphlet was Thomas Paine.

[8] *See* REID, CONCEPT OF REPRESENTATION, *supra*, at 120-22 (discussing proposals for parliamentary reform based on different conceptions of equality); and sources cited in n. 11, below.

The idea that representation was primarily about individuals, however, did not go uncontested. In all of the colonies, the rules prevailing before 1776 treated communities rather than individuals as the essential units of representation. Each town or county was typically given a specified number of seats in the colonial assembly, with larger communities like Boston or Philadelphia awarded extra seats, though not in strict proportion to population.[9] In the late colonial era, the Crown had sometimes tried to restrict the extension of representation to newly organized communities, in order to make legislatures more manageable – a practice sharply denounced in the Declaration of Independence.[10] This exclusion ended with independence, but Americans continued to debate whether representation should be based solely on the principle of communities, or whether differences in population or wealth (as measured by taxation) should govern the apportionment of legislative seats.[11] Although this debate occurred primarily within the individual states, it also figured in the framing of the Articles of Confederation. Delegates from the more populous states (including John

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[9] See sources cited in n.11, below.

[10] This is in fact the third in Jefferson "long train of abuses" charged to George III: "He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the legislature, a right inestimable to them and formidable to tyrants only." 1 FOUNDERS' CONSTITUTION, *supra*, at 10.

[11] On this debate and early practice, *see* WILLI P. ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 234-37 (expanded ed., trans. Rita and Robert Kimber, 2001); MARC KRUMAN, BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA 65-76 (1997); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 170-72 (1969); ROSEMARIE ZAGARRI, THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776-1850, at 36-60 (1987).

Adams and James Wilson) argued into 1777 that voting in Congress should also be tied to population or wealth.[12]

In the years after 1776, John Adams's image of a representative assembly as a "mirror" of the people appears to have become commonplace. It is restated, for example, in the "Essex Result" of 1778, a protest drafted by the young attorney, Theophilus Parson, in part to justify the principle of equal representation as Massachusetts was debating the adoption of a constitution.

> The rights of representation should be so equally and impartially distributed, that the representatives should have the same views, and interests, with the people at large. They should think, feel, and act like them, and in fine should be an exact miniature of their constituents. They should be (if we may use the expression) the whole body politic, with all it's property, rights, and priviledges, reduced to a smaller scale, every part being diminished in just proportion.[13]

Like the author of *Four Letters on Interesting Subjects*, Parsons also recognized the value of fixing rules for reapportionment.

> The rights of representation should also be held sacred and inviolable, and for this purpose, representation should also be fixed upon known and easy principles; and the constitution should make provision, that recourse should constantly be had to those principles within a very small period of years, to rectify the errors

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[12] RAKOVE, BEGINNINGS OF NATIONAL POLITICS, *supra*, at 139-41, 158-59.

[13] [Theophilus Parsons], *Result of the Convention Holden at ipswich in the County of Essex* . . . (Newburyport, 1778), *reprinted in* THE POPULAR SOURCES OF POLITICAL AUTHORITY 341 (Oscar Handlin & Mary Handlin eds., 1966).

> that will creep in through lapse of time, or alteration of situations.[14]

This vivid image of representation was also invoked at the Federal Convention of 1787 when the framers discussed the composition of the future House of Representatives. "The Legislature ought to be the most exact transcript of the whole Society," James Wilson declared on June 6. George Mason echoed the point. "The requisites in actual representation are that the Reps. should sympathize with their constituents; shd. think as they think, & feel as they feel," even to the point that "the diseases of the people shd. be represented." Mason emphasized the *attitudes* that representatives should possess, but the collective body of lawmakers cannot "think and feel" as the people do unless a close correspondence also exists between the composition of the representative assembly and the larger society.[15]

This theme of correspondence was also echoed in the public debate over ratification, and by Anti-Federalists as much as by the supporters of the Constitution. In the view of the former, the lower house of Congress would simply be too small to represent the entirety of the American people adequately. As Melancton Smith, the author of the *Letters from the Federal Farmer*, observed,

> a full and equal representation of the people, is that which possesses the same interests, feelings, opinions, and views the people themselves would were they all assembled – a fair representation, therefore, should be so regulated, that every order of men in the community,

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[14] [Parsons], *supra*, *repinted in* THE POPULAR SOURCES OF POLITICAL AUTHORITY, *supra*, at 341.

[15] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 132-33 (Wilson), 133-34, 142 (Mason) (M. Farrand ed., 1966). The debates of 1787-1788 over representation are further discussed in JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 203-43 (1996).

> according to the common course of elections, can have a share in it . . .[16]

Similarly, the Anti-Federalist writer "Brutus" argued that

> The very term, representative, implies that the person or body chosen for this purpose should resemble those who appoint them – a representation of the people of America, if it be a true one, must be like the people. It ought to be so constituted, that a person, who is a stranger to the country, might be able to form a just idea of their character, by knowing that of their representatives. They are the sign – the people are the thing signified.[17]

For Anti-Federalists, a central defect of the Constitution was that the relatively small House of Representatives could no longer offer an adequate mirror or portrait of the larger society.

To be sure, the question of how, precisely, a representative assembly should be turned into this mirror could not be settled by abstract definition or choice of metaphor. For the *Federal Farmer*, for example, the issue was primarily a matter of class: how were ordinary Americans, farmers and tradesmen, to secure election in competition with their wealthier, more cosmopolitan neighbors? Others worried that representatives from far distant states or districts would find it difficult to attend Congress, thereby effectively disfranchising their constituents. It was also, initially, a question whether the people of the states would be better represented through a system of district elections or by a statewide election. Whereas a district system quickly came to be the norm in larger and more populous states, many smaller states retained

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[16] [Melancton Smith], Letters from the Federal Farmer, II, *reprinted in* 2 COMPLETE ANTI-FEDERALIST 230 (H. Storing ed., 1987).

[17] Brutus, III, Nov. 15, 1787, *reprinted in* 2 COMPLETE ANTI-FEDERALIST, *supra*, at 379.

a statewide system for electing representatives until 1842, when Congress exercised its Article I, Section 4 authority to mandate a district system throughout the Union.[18]

The critical point, however, is that members of the Founding generation, on both sides of the debate of 1787-88, thought of political representation as a process of creating a close correspondence between the citizenry and their legislative assemblies. This central premise behind the drafting of Article I generally, and those provisions governing the composition and election of the House in particular, must inform any analysis of the original understanding of the authority of state legislatures under Article I, Section 4, Clause 1 to regulate the election of federal Representatives. In particular, this background norm makes clear that regulations governing the election of Representatives must serve the fundamental goal of creating a "mirror," or close correspondence, between the electorate and its representatives, rather than promoting the partisan interests of those who control the state legislature itself. This understanding is confirmed by a second, widely shared principle that animated the Framers: the new constitution should avoid the corrupting evils of the British system in which those in power sought to perpetuate their power.

II. A SECOND CENTRAL STRUCTURAL PREMISE BEHIND THE FRAMING OF ARTICLE I WAS THAT THE COMPOSITION OF THE HOUSE SHOULD NOT BE CORRUPTED BY THOSE SEEKING TO PERPETUATE THEIR POWER.

The allure that the ideal and image of equal representation had for Americans stemmed from several sources. One was customary: Americans were used to the idea that representation was naturally granted to communities as they were legally organized. Another was controversial: that is,

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[18] ZAGARRI, POLITICS OF SIZE, *supra*, at 36-60, 125-44.

the Crown's refusal to enlarge the assemblies to accommodate new communities became one grievance among the many that the colonists expressed in the decade before independence. A third, however, deserves special emphasis. Americans regarded the denial and restriction of the right of representation in Britain as a significant element in the widely perceived "corruption" of the independence of Parliament and thus a violation of the true principles of the British constitution, as those principles were settled in the Glorious Revolution of 1688 and its aftermath. Colonial perceptions of the distortion of proper representation in the mother country suggest that Americans were concerned about the capacity of those holding power to manipulate the rules of representation to their partisan advantage. To meet its principled objectives, the system of representation had to be free of the taint of corruption and improper influence that were widely believed to permeate the eighteenth-century British constitution.

Well before the Revolutionary crisis, the colonists eagerly consumed the writings of British political writers who denounced the "rotten" and "corrupt" features of the eighteenth-century British constitution.[19] Americans understood that the suffrage was far more limited in the mother country than it was in the colonies. They also knew that numerous members of the House of Commons sat for "rotten boroughs" with minuscule human populations, while populous communities, such as the manufacturing towns of the Midlands, had never been granted the right to elect representatives. They were also aware of the existence of "pocket boroughs" where a dominant government interest or local aristocrat easily controlled small numbers of voters. Americans repeatedly read that the Crown used all the modes of patronage at its disposal (offices, honors, and pensions) to

[19] Such criticisms dated to the seventeenth century; *see* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 157-158 (1689).

maintain its control of the House of Commons, making docile "placemen" of members who were supposed to check the abuse of power by the executive.

Together, these practices of "corruption" threatened the principle of parliamentary supremacy confirmed in the Glorious Revolution of 1688. A limited suffrage and a mal-apportioned House of Commons made Parliament an unrepresentative institution. The theory of "virtual representation" held that it did not matter whether particular communities or large segments of the population lacked the suffrage so long as Parliament had information about their condition and regarded itself as responsible for promoting the welfare of the realm. But Americans generally dismissed this theory as a crude fiction which masked the effective control that the Crown enjoyed over both houses of Parliament. The denial of representation to populous boroughs seemed transparently unjust. As the Massachusetts radical James Otis famously asked, "To what purpose is it to ring everlasting changes to the colonists on the cases of Manchester, Birmingham, and Sheffield, who return no members? If those now so considerable places are not represented, they ought to be."[20]

It did not, therefore, require the invention of political parties in the 1790s or Elbridge Gerry's famous "gerrymander" of 1812 to expose the danger of allowing government to manipulate the design of electoral districts at the expense of equal representation. The perception of the royal abuse of its power to grant (or withhold) the right of representation as part of the chartering of boroughs was well established in America even before 1765, and seemed all the more ominous after a docile Parliament began enacting legislation infringing colonial rights and liberties. All that

[20] JAMES OTIS, CONSIDERATIONS ON BEHALF OF THE COLONISTS . . ., at 9 (London, 1765), *quoted in* BAILYN, IDEOLOGICAL ORGINS, *supra*, at 169.

had to happen after 1776 was for Americans to transpose the source of this threat from the British crown to their own republican legislatures. As we have already seen, they were more than prepared to do so, first in framing the state constitutions of the mid 1770s, then in adopting the Federal Constitution in 1787-1788.

III. IN EXERCISING THEIR CONSTITUTIONAL AUTHORITY TO REGULATE THE ELECTION OF REPRESENTATIVES, STATES ACT AS AGENTS WHOSE ACTIONS MUST NOT PROMOTE THEIR OWN INTERESTS BUT THOSE OF THEIR PRINCIPALS, THE PEOPLE THEMSELVES.

The emergent American conception of representation was part of a broader shift in political thought in which the people came to regard themselves not as subjects but as rulers. The fundamental structural principle of the federal Constitution (as well as the state constitutions of the period) is thus that a sovereign People has delegated its powers to government agents to act in their interests.[21]

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[21] *See* BAILYN, IDEOLOGICAL ORIGINS, *supra*, at 198-229; Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L. J. 1425, 1430-36 (1987); *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 294-96 (1936). State constitutions of the period commonly referred to the officers of government as the trustees, servants, or agents of the sovereign people, *see, e.g.*, MASS. CONST., pt. 1, art. IV (1780), *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 956, 958 (B.P. Poore ed., 2d ed. 1877) [hereinafter "Poore"]; N.H. CONST., pt. 1, art. VIII (1784), *reprinted in* 2 Poore, *supra*, at 1280, 1281; MD. CONST., Declaration of Rights, art. IV (1776), *reprinted in* 1 Poore, *supra*, at 817, 817-18; PA. CONST., A Declaration of the Rights of the Inhabitants of the State of Pennsylvania, art. IV (1776), *reprinted in* 2 Poore, *supra*, at 1540, 1541, and spoke of the vesting of the legislative or executive powers in officers or assemblies, *see, e.g.*, N.H. CONST., pt. 2 (1784), *reprinted in* 2 Poore, *supra*, at 1280, 1284; PA. CONST., Plan or Frame of Government, §§ 1, 2 (1776), *reprinted in* 2 Poore, *supra*, at 1540, 1542; S.C. CONST. art. VII (1776),

Viewed against a legacy of British politics that predisposed Americans to mistrust the abuse of government discretion in setting basic rules of representation, the Times, Places and Manner Clause of Article I is properly understood as a limited delegation of power to legislatures, as agents, to regulate elections in a manner that promotes the interests of the people, not those of the legislature itself. Indeed, this understanding explains why this seemingly minor provision became controversial during ratification.

The clause was first prepared by the Committee of Detail that met between July 26 and August 6, 1787. It was debated in the Convention on August 9, when two delegates from South Carolina – a State notorious among the Framers for its mal-apportionment – moved to delete the proposed congressional oversight of state legislation. That motion was rejected, the language of the proposed clause was slightly modified, and it was then approved unanimously.[22]

The discussion of August 9 is most notable for James Madison's vigorous defense of potential congressional intervention to correct improper state regulation of elections. Madison warned that

> [i]t was impossible to foresee all the abuses that might be made of the discretionary power [afforded the States under the Time, Places and Manner clause]. Whether the electors should vote by ballot or vivâ voce, should assemble at this place or that place; should be divided into districts or all meet at one place, shd all vote for all

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reprinted in 2 Poore, *supra*, at 1615, 1617; N.Y. CONST. art. II (1777), *reprinted in* 2 Poore, *supra*, at 1328, 1332.

[22] The evolution of the clause can be traced in 2 RECORDS OF THE FEDERAL CONVENTION, *supra*, at 135, 153, 155, 165, 179, 239-42 (debate of Aug. 9), and 613 (for final modification prohibiting Congress from altering "the places of chusing Senators," which was done, according to James Madison's notes, "to exempt the seats of Govt in the States from the power of Congress").

the representatives; or all in a district vote for a number allotted to the district; these & many other points would depend on the Legislatures. and might materially affect the appointments. *Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter.*[23]

As this last sentence makes clear, Madison regarded as just causes for congressional regulation both the legislative manipulation of electoral rules to secure partisan goals and the denial of the substantive equality of the voters. These standards go beyond more obvious concerns that may have prompted this clause in the first place: the fear that recalcitrant state legislatures would try to hamstring the national government simply by failing to provide for the election of representatives or by defaulting on their responsibility to appoint senators. In the case of the House of Representatives, the true right to be protected belonged to the people, who were to be treated equally, and not to the state legislatures, which were only instrumentally necessary to arrange for the conduct of elections. In the brief debate that followed, none of the speakers challenged Madison's statement.[24]

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[23] 2 RECORDS OF THE FEDERAL CONVENTION, *supra*, at 240-41 (emphasis added).

[24] The Constitution did not, of course, specify what system the states had to apply. But the logic of congressional oversight was to provide a corrective to the problem of disparities in districts, for in a statewide system of election, all individual votes would necessarily weigh equally (so long as voters enjoyed ready access to the polls). In the federal elections of 1788-1789, the states adopted three distinct modes of electing the first House. For the relevant legislation and other sources, *see* 1-3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS (M. Jensen & G. Deboer eds., 1976-1989).

There is a further and rather obvious reason to conclude that the framers of the Constitution would have been disturbed by patterns of districting that were contrived to advance the preferences of state legislators rather than voters. The state legislatures were already to be directly represented in the Senate. There could be no pretext for asserting that a second form of representing the preferences of legislators more than voters was needed. Among the several arguments made to justify both the equal state vote in the Senate and the election of senators by the legislatures, arguably the most important was the role this institution would play in protecting the interests of the state governments. As George Mason observed on June 7, immediately before the Convention first approved the election of senators by the legislatures: "The State Legislatures also ought to have some means of defending themselves agst. encroachments of the Natl. Govt."[25] The framers reached a broad consensus on this point early in their debates; thereafter delegates from the small states reiterated the same theme as they struggled to secure an equal state vote in the Senate.[26] From the standpoint of the original intentions of the framers of the Constitution, the construction of the Senate afforded a sufficient security for the protection of the essential interests of the state governments.

The possibility that Congress could override state electoral provisions at any time proved a source of controversy during ratification. Anti-Federalists predictably argued that the

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[25] 1 RECORDS OF THE FEDERAL CONVENTION, *supra*, at 155.

[26] See, for example, the remarks of Roger Sherman on July 14: He "urged the equality of votes not so much as a security for the small States; as for the State Govts. which could not be preserved unless they were represented & had a negative in the Genl. Government." 2 RECORDS OF THE FEDERAL CONVENTION, *supra*, at 5.

power would be subject to congressional abuse, which would typically take the form of managing the electorate by restricting access to inconvenient polling places. "The elections may be held at one place, and the most inconvenient in the State," Patrick Henry warned; "or they may be at remote distances from those who have a right of suffrage: Hence nine out of ten must either not vote at all, or vote for strangers; For the most influential characters will be applied to, to know who are the most proper to be chosen."[27] Variations on this theme were repeated in other states. One New York Anti-Federalist, for example, warned that Congress might decide upon

> holding an election for the whole state at Poughkeepsie, at New-York, or, perhaps, at Fort-Stanwix: who will then be the actual electors for the house of representatives? Very few more than those who may live in the vicinity of these places. Could any others afford the expence and time of attending? And would not the government by this means have it in their power to put whom they pleased in the house of representatives?[28]

Although objections like these reflected the paranoid, parade-of-horribles strain in Anti-Federalist thinking, they also testified to a keen awareness of the danger that any legislative body could be prone to manipulating the rules of election to advance the interests of those in power, and the importance of preventing such manipulation.

A more sophisticated Anti-Federalist response came from the Federal Farmer and Melancton Smith, who faulted the Constitution for not explicitly requiring elections by districts. In a statewide election, where mere pluralities were likely to

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[27] Patrick Henry, Speech in Virginia ratifying convention, June 5, 1788, *reprinted in* 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 964-65 (J. Kaminski & G. Saladino eds., 1990).

[28] Cato, Letter VII, *reprinted in* 2 COMPLETE ANTI-FEDERALIST, *supra*, at 125.

be enough, those who lived in towns or enjoyed other social advantages would find it easier to coalesce on candidates than farmers scattered across the landscape. Conversely, election by districts would have the dual advantage of encouraging the choice to be made by majority and to produce candidates more truly representative of their constituents. In this calculation, the risk of allowing some manipulation of districts to occur was offset by the likelihood that such constituencies, if properly constituted, would fulfill the goal of producing a correspondence between voters and lawmakers.[29]

Most Federalist responses to these allegations took the form of identifying the exposed position in which the national government would find itself if states failed to make satisfactory provision for the election of members of Congress or simply refused to participate. Because the state legislatures were often portrayed as net losers in a competition for authority with the proposed government, it followed that they would have an institutional incentive to hobble Congress by obstructing elections. But the possibility that state legislatures would manipulate the electoral system for other reasons was also discussed by some Federalists. Again the most notable statement comes from Madison, who repeated the same concern he had voiced at Philadelphia. "Some States might regulate the elections on the principles of equality, and others might regulate them otherwise," Madison told the Virginia ratification convention. "The diversity would be obviously unjust" – unjust, that is, to the people themselves, not their legislators. Madison cited the particular case of South Carolina, where mal-apportionment was already and would long remain a problem, but also noted that "Elections are now regulated unequally" in other states as

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[29] Federal Farmer, XII, *reprinted in* 2 COMPLETE ANTI-FEDERALIST, *supra*, at 294-301. In the New York convention, Smith proposed a constitutional amendment requiring election by majority vote in districts. 2 FOUNDERS' CONSTITUTION, *supra*, at 268-70.

well. "Should the people of any State, by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the General Government."[30] Madison's position on this critical question may have been more advanced and more thoroughly conceived than that voiced by other participants in the debate, but it was also consistent with the egalitarian thrust that had characterized the leading edge of American thinking since 1776 if not indeed earlier.

The general discussion of the ratification period thus supports two critical conclusion about the Times, Places and Manner Clause. First, it was possible in 1787-1788 to conceive of the purpose of this clause in robust terms, as a vehicle not only to ensure that states conducted congressional elections, but also that in doing so they conformed to principles of just representation, of which the most important was to assure that votes counted equally, in the same sense in which modern constitutional jurisprudence speaks of the one person, one vote standard. As Madison's comments in particular make clear, the clause was concerned with the justice of elections as well as the mechanisms of taking the vote. Second, Federalists and Anti-Federalists were equally alert to the danger of legislative manipulation of congressional districts. Drawing upon their knowledge of British history as well as expressing the fears of concentrated power that were already embedded in American political ideology, they respectively feared that either the state legislatures or Congress would discover partisan, self-aggrandizing incentives to use the design of electoral districts

[30] James Madison, Speech of June 14, 1788, *reprinted in* 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra*, at 1260. By suffrage, Madison clearly does not mean the right to vote per se, but to have one's vote properly weighed in a scale of representation. On South Carolina, *see* ZAGARRI, POLITICS OF SIZE, *supra*, at 46-53.

for improper and unjust purposes. They differed only in the location of the danger.

Of course, amid the prevailing absence of cohesive, disciplined political parties of the kind that would soon develop so quickly, Americans in the 1780s did not foresee the precise form of partisan manipulation that has flourished in recent decades. But they plainly recognized the roles that "factions" would play in seeking governmental power, and both sides of the constitutional debate treated the possibility of legislative manipulation of election rules as a real threat to the fundamental right of representation. As both sides also accepted the image of representation as a "mirror," they would also understand how contemporary methods of designing electoral districts to maximize partisan advantage embody only a modern version of a general problem with which they were already familiar, and that the Constitution was intended to prevent.

CONCLUSION

In light of this historical analysis, *Amici Curiae* believe that congressional districting schemes that are consciously contrived to convert the majority preferences of voters into the majority preferences of state legislators violate the fundamental principle of popular representation as it was understood by the framers and ratifiers of the constitution.

As noted earlier, the controlling image of a representative assembly as a mirror, miniature, or portrait of society is susceptible to more than one interpretation or application. The founding generation itself was uncertain, for example, whether the only unit to be measured in defining the equality of districts was population, or whether apportionment should also recognize wealth, as measured in the number of taxpayers or the quantity of taxes. At the state level of politics, where it was feasible to think of towns and counties as the essential units of representation, one could start with a

principle that treated all communities as equally entitled to seats in the legislature, and then allocated additional seats to a handful of larger towns. At the national level, however, the small size of the House of Representatives necessitated lumping communities into districts larger than counties or towns, and thereby opened opportunities for creative districting that politicians have been learning to exploit ever since.

Population equality among districts within a state is one criterion for satisfying the founding generation's principled criteria for representation. But there are circumstances under which it cannot be a sufficient or sole criterion. Districts that systematically maximize the influence of one class of voters while systematically diluting the influence of another are inconsistent with the constitutional goal of producing a deeper correspondence between the electorate and its representatives, and would fall under James Madison's conception of "the abuses that might be made of the discretionary power" of the state legislatures.

A decade after he wrote the Essex Result, Theophilus Parsons defended the Terms, Places and Manner Clause on grounds that have a strikingly modern ring. Speaking as a Federalist delegate to the Massachusetts ratification convention, Parsons reminded his colleagues of the danger that members of the national government – specifically the Senate – might abuse their formal connections and influence with the state legislatures to deprive significant segments of the citizenry of their just representation.

> But a state legislature, under the influence of their senators . . . or under the influence of ambitious or popular characters, or in times of popular commotion, and when faction and party spirit run high, would introduce such regulations as would render the rights of the people insecure and of little value. They might make an unequal and partial division of the states into districts,

> for the election of representatives, or they might even disqualify one third of the voters.[31]

A plausible case can be made that the modern practice of reapportionment, undertaken at a time "when faction and party spirit run high," has proved increasingly capable of attaining exactly the results that Parsons denounced – not, it is true, by disqualifying voters in the formal sense, but by drawing district lines in ways that are "unequal and partial" in terms of their disparate impact on the results that finally matter.

In the 1780s, as in the 1950s, population inequality among districts would have been the most glaring example of an abuse. Political parties had not yet formed as mechanisms for mobilizing voters and crafting programs of public policy. The principal social differences within any state would separate farmers from inhabitants of port towns, and densely settled coastal regions from newer communities in the interior. Under such conditions, it was only natural to think of attaining a rough but measurable equality among districts as the obvious means of preserving the genuinely representative character of a legislature.

Once political parties form, however, and provide voters with new and primary criteria for defining their political identity, it becomes a legitimate question whether the population equality of districts suffices to meet the founders' test. For the voters themselves, party allegiance has become the most obvious way of stating their political identity, and thereby constituting, in the aggregate, the representative "mirror." One would not, of course, expect that a statewide distribution of voters would be replicated in every district within a state. But when ample evidence exists of the care with which state legislative majorities have consciously designed districts not only to preserve safe seats for their own

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[31] Theophilus Parsons, Speech of Jan. 16, 1788, 6 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra*, at 1217-18.

party but to turn a minority of the popular vote into a supermajority of congressional seats, there is good reason to suspect that they have "a favorite measure to carry," and are in fact improperly "taking care so to mould their regulations as to favor the candidates they wished to succeed."

On this basis, then, *amici curiae* conclude that the last Pennsylvania redistricting contradicts the fundamental principles of representation laid down by the generation that wrote the first American constitutions of the 1770s and 1780s.

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August 29, 2003